Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16823/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 14 January 2022	**On the 29 March 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

OLABISI ENIOLA OGUNTOYE
(ANONYMITY DIRECTION NOT MADE)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. J Walsh, Counsel, instructed by Universe Solicitors Ltd
For the Respondent: Mr. S Whitwell, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Nigeria and is presently aged 33. She appeals against a decision of the respondent not to grant her leave to remain on human rights (article 8) grounds. The respondent's decision is

dated 2 October 2019. A deportation order made under section 32(5) of the UK Borders Act 2007 was issued by the respondent on the same day.

2. The First-tier Tribunal (Judge Swaney) allowed the appellant's appeal by a decision dated 26 March 2021. The respondent was granted permission to appeal by Judge O'Garro on 7 April 2021. By a decision dated 24 August 2021 I allowed the respondent's appeal to the extent that the decision of the First-tier Tribunal was set aside, and it would be remade by this Tribunal. The findings of fact made by Judge Swaney at [60]-[92] of her decision were preserved.

3. I allowed the appellant's appeal at the conclusion of the resumed hearing and now give my reasons in writing.

Anonymity

4. By my decision of August 2021, I noted the observation of Elisabeth Laing LJ in *Secretary of State for the Home Department v. Starkey* [2021] EWCA Civ 421, at [97]-[98], made in the context of deportation proceedings, that defendants in criminal proceedings are usually not anonymised. Both the First-tier Tribunal and this Tribunal are to be mindful of such fact. I was satisfied that the appellant had already been subject to the open justice principle in respect of her criminal conviction, which is a matter of public record and so considered to be known by the local community.

5. I concluded that the common law right permitting the public to know about Tribunal proceedings in this matter, a right further protected by article 10 ECHR, outweighed the appellant's rights protected under article 8 ECHR: *Cokaj (anonymity orders, jurisdiction and ambit)* [2021] UKUT 202, at [17]-[28]. I did not make an anonymity order.

6. The appellant did not seek an anonymity order at the resumed hearing.

Background

7. The appellant was granted entry clearance as a student on 5 February 2008, when aged 19, with leave to enter valid until 31 May 2009. Her leave was subsequently varied until 31 December 2011.

8. Her first child was born in 2011. Soon afterwards she married the child's father, Mr. Babatunde Oguntoye, a Nigerian national who, at the time, enjoyed settled status in this country.

9. In December 2011 the appellant applied for leave to remain as the spouse of her husband, and consequent to her successful application

she secured leave to remain until 7 December 2013. She was subsequently granted indefinite leave to remain on 8 December 2013, when aged 25.

10. The appellant's second child was born in 2014. Both children are British citizens.

11. In 2020 the appellant was awarded a B.Sc. (Hons) in Finance and Accounting from Anglia Ruskin University.

Index offence

12. The appellant, along with her husband and nine others, was convicted of concealing criminal property, contrary to section 327(1) of the Proceeds of Crime Act 2002. All eleven were engaged in a criminal network concerned with money laundering. Five members pleaded guilty. The other six, including the appellant and her husband, were convicted by a jury on 24 January 2017 following a 37-day trial at Woolwich Crown Court.

13. The eleven defendants acted as a gang of 'money mules' laundering money through their accounts accrued from victims of 'mandate fraud'. The victims received spoof emails from what they believed were legitimate companies or people that they trusted. Often, the victims were due to transfer or pay money to that company or person, but the fake emails contained the details of bank accounts controlled by a criminal gang.

14. Money mules engage in 'squaring'; namely they transfer stolen money on behalf of others, usually through their bank account, and are often paid in cash to receive the money and to transfer it into another account. In this instance, once money was transferred into an initial account, it was then expeditiously moved on through several other accounts controlled by the defendants in a process called 'layering'. The money was then finally withdrawn as large amounts of untraceable cash from branches or through cash point machines.

15. The police investigation into the defendants commenced in 2013 and established that they received in the region of £1.8 million into their accounts between January 2011 and December 2013. Police identified seventeen victims, a mixture of companies and individuals, including victims based in Sweden, Nigeria, Mauritius, France, Switzerland and the United States of America as well as United Kingdom-based victims.

16. The trial judge, HHJ Hehir, observed when sentencing, *inter alia*:

> ‘The monies laundered were the fruits of sophisticated online fraud of a sort commonly referred to diversion frauds. The victims, who included both companies and individuals, were induced often by sophisticated means to transfer monies to legitimate suppliers or other contacts into accounts held by you, collectively or individually, or under your control.
>
> None of you carried out these frauds but what you did in laundering the money placed you close to the frauds because the money that was harvested was then directly or indirectly paid into bank accounts held or controlled by you and, where payments were not direct, money thereafter passed through and between your accounts in a process which is described as layering, again indicative of sophistication and designed to conceal the ultimate origins of criminal monies.
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> I observe that the sophisticated online fraudsters could not carry out their work without money-launderers because the nature of the fraud being online depends on money-launderers in order to succeed.’

17. On 3 March 2017, the appellant’s husband was sentenced to six years’ imprisonment. He was identified by HHJ Hehir as the prime mover in the sophisticated money-laundering operation: “I regard you as having sat at the centre of the web of money-laundering … having carefully listened to all of the evidence in the case, including your own evidence, unfortunately I have no option but to conclude that you are a thoroughly dishonest man who was utterly embroiled in financial misconduct of various sorts.”

18. On the same day the appellant was sentenced to two years and six months’ imprisonment. In sentencing the appellant, HHJ Hehir placed her in the higher echelons of the criminal network:

> ‘My assessment of the evidence is that you were your husband’s willing and enthusiastic lieutenant in what he did. I am prepared to accept that you may not have become involved or intimately involved in what he was doing at the very start but relatively quickly you did and I reject any submission that you would have been anything other than entirely aware and supportive of what he was doing in pursuance of the money-laundering operation.
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> As I have already observed, you and he lived very well indeed; extravagantly is not too strong a word, despite the fact that he and you had few, if any, legitimate sources of income. You did work at Marks & Spencer's. He may have done some work but the vast majority of your income was clearly criminal in origin.

> You are not responsible for everything he did. You are not punished for being his wife but I am entirely satisfied that you knew what he was doing and you played, as I say, your enthusiastic part in helping him.
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> You were motivated to do so, I am entirely satisfied, by greed, plain and simple. You wanted a good lifestyle and you weren't too bothered how you got it.
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> A telling piece of the evidence in your case, in my judgment, was provided by some jottings in a notepad that were recovered from your home address by the police. They were very detailed costings, I am satisfied, for a building project in Nigeria, the amounts carefully calculated, written out in Nigerian naira, coming out to a sterling equivalent of about £16,000. It sat ill with your protestations that despite your accountancy studies you understood little about accounting. Of course, the matter may be further litigated in confiscation proceedings, but it is perfectly clear to me that this was you making plans to salt away, if you had not already salted away, some of you and your husband's ill-gotten gains in Nigeria.
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> Some £230,000 of criminally acquired money passed through your bank account. I am not attracted by the submission in the case of any defendant that some of the monies identified may have had legitimate sources and you are responsible for over £100,000 in cash withdrawals. This was sophisticated and persistent offending.
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> I listened with care to your evidence on oath. I have come to the conclusion that you, like your husband, unfortunately, are an utterly dishonest individual. You sought in a sophisticated way to present yourself as someone who was unwilling and/or unable to question your husband's activities and, absurdly, somebody who wasn't really very interested in his business activities or how precisely money came into your home.
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> You trained as an accountant. You told the jury you had ambitions to work as an accountant in a top firm. You are entirely unsuited to practice as an accountant to handle anybody else's money and it is a welcome consequence of your conviction, I have to say, that you will never be able to practice as an accountant or anything like it.
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> You are, in my judgment, not quite as guilty and not quite as seriously implicated in money-laundering as your husband, but you are very heavily implicated indeed.'

19. As to the appellant's custodial sentence, HHJ Hehir observed:

> 'What makes sentencing you so difficult is the position with your children. You have two young children. One of them has profound health difficulties. I have read with care all the material that has

> been put before me in relation to that aspect of your personal situation, including the psychological report of Dr Oboho. That deals to some extent with the negative consequences of conviction on you but, rightly, the real stress is on the position with your young children and the obvious impact that you being sent to prison would have on them as your sole carer.
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> …
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> I have reflected long and hard on your position and what I ought to do to reflect the fact that you are the sole carer of two young children who depend upon you.
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> …
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> Were it not for the position with your children, the sentence I had in mind was one of four and a half years' imprisonment. To reflect the fact that your children will be deprived of your loving care for a substantial period and the negative consequences this will inevitably have on you, I am going to substantially reduce your sentence of imprisonment but the least sentence I can pass on count three is one of two and a half years' imprisonment.'

20. The other members of the criminal network received sentences ranging from two years and four months' imprisonment to six months' imprisonment, suspended for eighteen months.

Deportation proceedings

21. On 2 October 2019 (served on 8 October 2019) the respondent decided to refuse submissions made on behalf of the appellant pursuant to the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') and under the Human Rights Act 1998. A decision was made to deport the appellant to Nigeria and a deportation order was signed on 2 October 2019.

Preserved findings of fact made by the First-tier Tribunal

22. The appeal came before Judge Swaney, sitting at Taylor House, on 16 February 2021. Several findings of fact made by Judge Swaney have been preserved.

23. The Judge dismissed arguments advanced on the appellant's behalf in relation to the 2016 Regulations: [60]-[68] of the decision.

24. It was accepted that the appellant enjoys a family and private life in the United Kingdom, having resided lawfully in this country since 2008, and

the respondent's decision causes an interference with the enjoyment of such rights: [69]-[70].

25. The Judge noted that the appellant was sentenced to thirty months' imprisonment and so was a medium offender for the purposes of Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'): [71].

26. The appellant's concession that she does not satisfy the private life exception to deportation established by the 2002 Act was noted at [72]. The appellant has not lived lawfully in this country for most of her life and so cannot meet the requirements of section 117C(4).

27. As to the best interests of the children, the Judge concluded:

> '73. Before considering the terms of the family life exception to deportation, I have considered the best interests of the appellant's children. They are both British citizens and were born in the United Kingdom. They have never lived elsewhere and have never visited Nigeria. They are now nine and six years old. The children were cared for by their paternal grandparents whilst the appellant was in prison. It is stated that they have not had any contact with the children since the appellant was released from prison and that they would no longer be willing to care for them.
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> 74. I find that it is in the best interests of the appellant's children to remain in her care in the United Kingdom. Here they can continue to enjoy the rights and entitlements of their British citizenship. They are both in education and the appellant's daughter in particular is beginning to develop ties outside of her immediate family unit.'

28. At [75] of her decision, the Judge accepted that the appellant's children were 'qualifying children' for the purpose of section 117C.

29. The Judge recorded at [77] that the respondent accepted at para. 40 of her October 2019 decision letter that the children could not remain in this country without their mother. The Judge rejected the respondent's contention that the children could be cared for in this country if the appellant chose to leave them here: [77]-[78].

30. The Judge found that it would be unduly harsh to expect the appellant's children to remain in the United Kingdom without her. However, she noted that whilst it was in the best interests of the children to remain in this country such fact alone was not determinative as to the question of

whether it would be unduly harsh for them to accompany their mother to Nigeria: [81]-[82].

31. The Judge did not accept the appellant's contention that her medical conditions were such as to prevent her working or studying in Nigeria: [83].

32. She found it more likely than not that the appellant would be able to find employment in a larger centre such as Lagos where opportunities are likely to be better than in the village where she stated her mother resided: [84].

33. However, the Judge found that there were foreseeable obstacles in the appellant securing employment in cities such as Lagos:

> '85. Firstly, she will be responsible for caring for her two children and supporting them to adapt to life in Nigeria. Given their ages it is reasonably foreseeable that they would require considerable support as they adapt to a new education system, a different culture and what may well be a significantly different way of life. This is likely to limit the time the appellant is able to devote to looking for work once she finds work, the hours she is able to work. She will be returning to Nigeria as a single mother. I reject any suggestion from Ms. Lindsay that as the appellant's husband is also subject to deportation that he could reasonably be expected to assist in caring for the children. He is not doing so now and as he and the appellant are no longer in a relationship and their immigration matters are not linked, there is no guarantee that he would be deported at the same time as the appellant or at all given he has apparently formed a new family life.
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> ...
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> 87. The appellant has a criminal conviction for a serious offence. This may well impact on her ability to find employment in Nigeria, particular given her lack of employment history there and lack of contacts. It is reasonably foreseeable that she would have to declare her conviction to an employer. The appellant also claims that she would have difficulty finding work due to being a deportee from the United Kingdom. I do not accept that this is reasonably likely. There is no reason why the appellant should have to disclose the manner in which she left the United Kingdom to an employer and it follows that the only way this information will become known is if the appellant told someone.'

34. The Judge found at [86] that the appellant would have to re-adapt to life in Nigeria, having been absent since 2008 save for visits, the last of

which was in 2011. The Judge accepted that the appellant had previously enjoyed limited experience of living independently in Nigeria as an adult: “The appellant will therefore be meeting her own challenges as well as supporting the children. It is also reasonably foreseeable that she has limited connections which would be of assistance in helping her find employment.”

35. As to support, or otherwise, being made available to the appellant from her family in Nigeria, the Judge found that there may be limited support available to her.

Evidence

36. The appellant relies upon three witness statements dated: (1) 25 February 2019 (‘the 2019 statement’), (2) 27 January 2021 (‘the 2021 statement’), and (3) 7 January 2022 (‘the 2022 statement’).

37. She confirmed that her parents have separated, and her mother, who is presently aged 57, is suffering both from diabetes and the effects of a stroke that occurred in 2013. For a time, the appellant’s sister, Bukky, cared for their mother in Lagos. However, Bukky moved to Ghana with her husband in 2017 and so the appellant’s mother relocated in the same year to a village, Pelebosu, situated in Ondo State.

38. The appellant explained to me that her mother had never taken her to the Pelebosu, and she did not know whether there was a familial connection to the village. She further explained that Bukky arranged for a distant cousin to visit her mother to provide care. When asked whether Bukky pays the relative to care for their mother, the appellant replied, “I think so”.

39. In answer to a question from Mr. Whitwell the appellant amended her evidence, stating that her mother is living in “a family house” and residing with someone. She detailed that a person living in the property is paid by Bukky to care for their mother, though the appellant did not know how much they are paid.

40. The appellant informed me that her mother cannot speak at the present time as an ongoing consequence of her stroke, and therefore she does not possess a mobile phone. She detailed that Bukky “contacts someone who reaches out to the relative who cares for my mum”. The appellant informed me that she speaks to Bukky once or twice a month by phone.

41. By means of her 2022 statement the appellant addressed her mother’s circumstances in Pelebosu. She confirmed that the economic situation in the village is ‘extremely poor’, and no family members live there except

for her mother. Further, the village does not have a school, electricity is not constant and clean running water is scarce. She further detailed: 'Most of the children in the village do not attend school due to the lack of schools in the village. I do not know where [her children] would have to travel to, to attend a school'.

42. In her oral evidence the appellant confirmed that she has never visited Pelebosu. Her knowledge as to the lack of a school in the village is derived from her sister and from the relative who cares for her mother. She herself was required to undertake a Google search to find out about the village economy and the lack of a school. She informed me that it was Bukky who informed her that most children do not go to school, though some do attend a school three or four villages away. The appellant was unable to detail the distance of this school from the village of Pelebosu.

43. The appellant confirmed that she has had no contact with her elder brother since 2020. At the time he was living with his girlfriend in Lagos. I was informed that having graduated from university in 2009 he had never been employed. The appellant was clear in her evidence: "No job from leaving university". She confirmed that he had undertaken a placement with the National Youth Service, a compulsory one-year service open to graduates in Nigeria who are aged under 30. The appellant stated that upon not hearing from him in 2020 she sought to contact him: "Tried often times; twice a week". Bukky was also unable to contact their brother and travelled to Lagos from Ghana to locate him. Bukky spoke to her brother's girlfriend who informed her that she also could not find him. A report was subsequently filed with the police.

44. As for her father, the appellant has no idea where he is presently living. She informed me that she does not know if he is still living in Lagos. He has several wives and left her mother before 2017. She last spoke to him before she went to prison in 2017. She was subsequently informed by Bukky that he was very disappointed in her conviction and did not wish to be in touch with her.

45. She accepted that her father was a self-employed estate agent and funded her studies after she travelled to the United Kingdom in 2008. She accepted, after some discussion with Mr. Whitwell, that the course fees for her ACCA accountancy course amounted to £20,000 over five years, with her family paying £2,000 every six months for five years.

46. The appellant has two half-siblings on her father's side but asserted that she had no contact with them when growing up and has no contact with them at the present time.

47. The appellant detailed that the circumstances in her mother's village are such that it would be 'extremely difficult' for her to earn a living to support both herself and her two children. She was clear as to her having no family members in Pelebosu save for her ill mother.

Law

48. The appellant relies upon article 8. The issue before this Tribunal is whether the effect of the appellant's deportation on her children would be unduly harsh consequent to their accompanying her to Nigeria.

49. Section 117C(3) and (5) of the 2002 Act:

> '(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
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> …
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> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.'

50. The relevant part of paragraph 398 of the Immigration Rules ('the Rules') states:

> '398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
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> …
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> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months …'

51. Paragraph 399(a) of the Rules is consistent with section 117C(5):

> '399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision;

and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported.'

Decision

52. Ultimately, in assessing an appellant's credibility, a decision whether the account given is in the essential respects truthful must be taken by a tribunal on the totality of the evidence, viewed holistically: *Mibanga v. Secretary of State for the Home Department* [2005] EWCA Civ 367; [2005] I.N.L.R. 377.

53. The term 'credibility' is used a good deal in the context of decisions and subsequent appeals that come before the Immigration and Asylum Chamber. It does not have a special technical meaning. Rather, it connotes no more than whether an appellant's account of their personal history is to be believed.

54. The difficulties about equating a lack of consistency with a lack of honesty have been considered by the courts over the years and I observe the judgment of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm), at [16]-[21].

55. The former Senior President of Tribunals (Ryder LJ) identified in *Uddin v Secretary of State for the Home Department* [2020] EWCA Civ 338, [2020] 1 WLR 1562, at [11], the utility of the self-direction long-established in criminal proceedings by *R v. Lucas (Ruth)* [1981] QB 720: if a court concludes that a witness has lied about one matter, it does not follow that s/he has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure. That is because

a person's motives may be different as respects different questions. I am mindful of this self-direction.

56. I remain mindful that a person may exaggerate, or embellish, a strong claim simply because of a fear of losing an appeal. I also appreciate that someone may not be truthful because of shame of earlier criminality.

57. At the conclusion of the appellant's oral evidence, before the commencement of submissions, I indicated to the representatives that I did not consider the appellant, in the main, to be a credible witness to the remaining issues before me. Confirming such a conclusion at a hearing is not a step lightly taken. Indeed, it is one rarely taken on my part. I was mindful of the matters addressed above in respect of credibility and untruths. However, having read her witness statements and having heard her give evidence over time, I found the appellant to be a dishonest witness. I confirm that I placed HHJ Hehir's observations as to the appellant to one side at the outset of the hearing but having myself heard her explain her personal history and circumstances, though for significantly fewer days than HHJ Hehir, I share his adverse conclusions as to the appellant's approach to the truth.

58. I am satisfied that the appellant's core aims throughout her evidence before this Tribunal, both written and oral, were to remain in this country and to avoid any judicial consideration as to her transfer of, and access to, proceeds of crime. She consistently sought to shape her evidence to advance her core aims, and on several occasions when she became aware as to difficulties in her evidence, such as when inconsistencies were put to her, she adopted the manipulative, and crude, practice of crying to gain time to consider her answer.

59. Upon careful consideration, as explained to the representatives at the hearing, I do not accept much of the appellant's evidence as to her family and their circumstances. I am satisfied that she has sought to portray the existence of a distance between them and her, and to distort their present circumstances, solely to advance her case against deportation.

60. The appellant's evidence is that her parents have separated. This is plausible, and I accept it to be the present position.

61. It is a preserved finding that the appellant's mother resides in Pelebosu: see [84] of Judge Swaney's decision.

62. The appellant's evidence as to her mother's present circumstances in Pelebosu was racked with inconsistencies.

63. Her evidence has varied over time as to the nature of her mother's connection to Pelebosu. Before me she denied knowing of any previous connection between her mother and the village. However, in her 2021 statement she accepted that her mother went 'to her village'. I am satisfied this was a confirmation that she returned to her home village. I do not accept that the appellant's mother moved as a lone woman with, on the appellant's case, serious health concerns to a village to which she had no previous connection. I find that the appellant's effort to deny the existence of family members in the village, beyond one distant relative, is not credible. I am satisfied that before me the appellant sought to diminish the family connection to the village simply to enhance her assertion that there is no support available to her in Pelebosu.

64. Though her mother has resided in the village for approximately five years, the appellant was unable – or unwilling - to identify with whom her mother was residing, who cared for her and how much the carer was being paid. Her answers were vague on occasion, dismissive on others. Such evidence sits very poorly with the close relationship the appellant identified herself as having with her mother. Such disinterest is striking in circumstances where it is said that her seriously unwell mother lives so far away from her close family members.

65. Another striking aspect of the evidence is that for several years the appellant professed to having little or no knowledge of conditions in the village of Pelebosu where, on her account, her unwell mother resides. She confirmed at the hearing that she was required to undertake research before the hearing, including the use of Google, in respect of potential schools for her children and of the village economy. She detailed the distance of the village from Lagos but expressed surprise when Mr. Whitwell observed that the village was much closer to Benin City than Lagos.

66. Being mindful of the relevant burden and standard of proof I find that it is not credible that an unwell woman, said to be suffering significant ill-effects from a stroke that occurred some four years previously and with long-term diabetes, would in 2017 relocate away from Lagos with its attendant health care facilities, as well as move away from her son and one of her daughters, to reside in a village where electricity is not constant, clean running water is scarce and appropriate health care provision is limited if not non-existent. Being mindful that it is the appellant's evidence that her mother continues to suffer the consequences of a stroke, including loss of speech, it is not credible that the appellant would have no knowledge of who cares for her mother and how much they are paid. If the mother was as unwell as described by the appellant, she would be heavily reliant upon the care of those with

whom she resides and the appellant, as well as Bukky, would be expected to know who cared for her.

67. I accept that the appellant's mother had a stroke in 2013, whilst aged in her 40s. However, I do not accept that she is so unwell from the stroke that at the present time she cannot talk. I accept that she may require some care, but the appellant was unable to provide cogent evidence as to the substance and nature of the care provided. Indeed, the appellant's evidence varied wildly between her mother requiring constant or intermittent care.

68. I find that having separated from her husband, with her children enjoying their own lives, she decided to relocate to her home village to be closer to friends and family. The appellant's mother resided in Lagos for four years after her stroke and I conclude she believed that she could safely move to Pelebosu without further detriment to her health. I reach this conclusion because as to her own version of events, the appellant was unable to cogently explain why a seriously ill woman, unable to speak and suffering other significant effects from a serious stroke, would move from Lagos to a village with little or any health care provision. I find that the appellant has not provided a truthful account of her mother's circumstances, tailoring her evidence to seek to establish before this Tribunal that no support would be available for her and the children in Pelebosu.

69. My concerns as to the appellant's honesty in respect of her mother's circumstances in Nigeria are increased by her professed lack of knowledge as to the proximity of Benin City, the fourth largest city in Nigeria, to Pelebosu. Her answer is a further example of her deliberately seeking to advance a false case as to the hardship and lack of support available to her in Pelebosu that she sought to establish.

70. I conclude that the appellant's mother both resides with and engages with friends and family in Pelebosu. She is not suffering significant physical or financial hardship. Her present medical condition is not that consequent a stroke, she is unable to speak and is heavily reliant upon others.

71. As observed by Mr. Whitwell the appellant informed Judge Swaney that her sister relocated to Ghana in 2019. When the inconsistency was put to her, the appellant repeated that relocation occurred in 2017. I note that in both her 2019 and the 2021 statements the appellant identified her siblings as residing in Nigeria. I conclude that the appellant was referring to Bukky and her brother, as on her account as advanced in this appeal she does not know her half-siblings. I am satisfied that Bukky did not migrate to Ghana in 2017 or 2019, and such relocation was not

the impetus for the appellant's mother moving to Ondo State. I conclude that Bukky remains in Nigeria. It is possible that for a period she resided in Ghana, and it is upon this historical fact that the appellant relies. However, I am satisfied that she lives in Nigeria and continues to have personal ties to Lagos.

72. The appellant's evidence in respect of her father is founded upon him having disowned her following her conviction in 2017, and his whereabouts not being known. In her February 2019 statement she did not positively state, or implicitly aver, to having been disowned by him. She simply stated: 'My father and siblings in Nigeria are not financially capable of accommodating and maintaining me and my children should I be removed from the UK. I have brought a shame on my family and they try to distance themselves from me.' I note that the appellant identifies both her father and siblings as acting in a similar manner, though before me it was not her case that her brother and sister had disowned her. She confirmed regular contact with Bukky and with her brother before he disappeared. I am satisfied that the silence in her witness statements as to having been disowned, or as to the conversation with Bukky where her father's adverse views were conveyed, clearly identifies that the circumstances now advanced are untrue.

73. The question arises as to why the appellant has advanced the notion of a broken, dysfunctional family? The appellant arrived in the United Kingdom in 2008 and was able to afford at least £20,000 in course fees for her ACCA course. She acknowledged that her father paid for the fees, which are considerable, but sought to establish that she contributed to the cost of her educational fees through part-time work. Her evidence as to the nature and length of her part-time employment was vague, and I note HHJ Hehir's observation that by 2011 the appellant had few, if any, legitimate sources of income. I am satisfied that the appellant's contribution to her ACCA course fees was, at its highest, minimal and her evidence at the hearing was, again, directed to establishing that she could not obtain financial support from her family in Nigeria.

74. I find that the appellant has sought by her evidence to distance herself from her family in Nigeria, and in doing so has deliberately sought to portray a misleading image of her family's personal and financial circumstances. I am satisfied that her father is a businessman who has proven capable of funding his children through university, both in Nigeria and in the United Kingdom. I find that the appellant's father remains in contact with his five children, including the appellant, and continues to be a successful self-employed estate agent. Financial

support will be available to the appellant and her children from her father upon their return to Nigeria.

75. I note Judge Swaney's acceptance that the appellant has two full siblings and two half siblings. I observe the reference in the forensic psychiatrist's report to the appellant confirming in 2017 that 'one of her brother [sic] had just finished University course of study'. I accept that her older brother completed his university studies in 2009. This is consistent with a timeline in which the appellant, a younger sibling, commenced her tertiary education in 2008. I find that the appellant was referencing a younger male half-sibling as having completed university education in or around 2017. I conclude that contrary to the appellant's evidence before me, she does have knowledge of her half-siblings and is in contact with them. Such finding is consistent with that reached by Judge Swaney, at [88].

76. As to her elder brother, the appellant detailed in her 2019 and 2021 statements that he resided in Nigeria. Her position now is that he disappeared in 2020. During her oral evidence, she was very vague as to the circumstances of her brother's disappearance, with neither her brother's partner nor Bukky providing any insight into the events that led up to it. I accept that it is plausible that the appellant's brother, in his early to mid-thirties, may have suffered significant mental health concerns, including depression. However, the appellant's evidence that once he ceased contact, she tried on many occasions to call him, usually twice a week, without taking any other steps, is not credible. Having watched her give evidence about her brother, it was apparent that she exhibited disinterest. Beyond a report being made to the police by her brother's girlfriend, she could give no evidence as to having sought to establish his state of mind at the relevant time or whether he was struggling with personal pressures.

77. The appellant's evidence on other aspects of her brother's life lacked credibility. He is said not to have worked at all since 2009, save for one year with the National Youth Service, which is compulsory for graduates aged under 30. I have found above that the appellant's father is a self-employed estate agent with sufficient wealth to fund the appellant's initial studies in the United Kingdom. Further, on the appellant's evidence, the brother was able to live away from the family home with his girlfriend. The notion that he could not, at the very least, secure employment from his father after graduation is not credible, as is the assertion that as a graduate he was without any employment for a decade. Considering the appellant's evidence holistically, I find that she is not truthful when recounting the present circumstances of her brother. I find that her evidence in 2019 and 2021 is closer to the truth, namely that her brother resides in Nigeria. I further find that he is employed and

that he can provide support to both the appellant and her children upon return to Nigeria.

78. The appellant was on benefits from the time she was released from prison in December 2018 until she secured temporary employment in December 2020. She lost that job but secured another in August 2021 and presently earns £24,000 per annum. She resides in a council property, and cares for two children. She confirmed that she funded her B.Sc and her Master's degrees with student loans, borrowing in the region of £20,000. Money is now taken from her salary to repay the loans. She has no savings. She explained that her elder child had done well in their 11+ and had applied for three schools, all of which were some distance from her home area. When asked how her elder child would travel to these schools, the appellant explained that she had not considered what she would do. I consider it striking that in circumstances where the appellant asserts that she has financial constraints, and the costs of her elder child travelling some distance to school may be significant, she had given no thought as to how she could afford the travel costs. Nor was she able to coherently explain how she could meet basic living costs along with her children from student loans in the region of £20,000 when on her evidence her course fees were in the region of £18,000.

79. I rely upon the appellant's conviction as establishing that the appellant was knowingly engaged in criminal offending between 2011 and 2013. Despite her continued denial of such activity, I find that she held significant rank in a criminal network of money-launderers. I am satisfied to the requisite standard that significant funds were sent back to Nigeria by the appellant and her husband with an intention, at the very least, to build a property costing in the region of £16,000. Some, or all, of this money remains accessible to the appellant whilst she resides in this country. Further, she continues to have access to family support.

Undue harshness

80. The appellant was sentenced to a custodial term of less than four years, and so she can properly seek to benefit from the exception to the public interest in her deportation established as 'Exception 2' by section 117C(5) of the 2002 Act.

81. In *Patel (British citizen child – deportation)* [2020] UKUT 00045 (IAC) the Upper Tribunal confirmed that in its application to a 'qualifying child' within the meaning of section 117D of the 2002 Act, section 117C(5) imposes the same two requirements as are specified in paragraph 399(a)(ii) of the Rules; namely, that it would be unduly harsh for the child to leave the United Kingdom and for the child to remain. In both

section 117C(5) and paragraph 399(a)(ii), what judicial decision-makers are required to assess is a hypothetical question, namely whether going or staying 'would' be unduly harsh. They are not being asked to undertake a predictive factual analysis as to whether such a child would in fact go or stay.

82. Judge Swaney's findings that the children are qualified persons, and that the appellant satisfies the requirement that it would be unduly harsh for the children to remain in the United Kingdom without her are preserved.

83. Additionally, Judge Swaney rejected the respondent's contention that the children would be cared for outside of social services if left by their mother in this country.

84. That the best interest of the children is to remain in this country with their mother is not determinative of the appeal. Their best interest is a primary consideration but can be outweighed by the cumulative effect of other considerations: *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 A.C. 166.

85. Turning to the assessment of undue harshness, in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273, Lord Carnwath held at [22]-[23]:

> '22. Given that exception 1 is self-contained, it would be surprising to find exception 2 structured in a different way. On its face it raises a factual issue seen from the point of view of the partner or child: would the effect of C's deportation be "unduly harsh"? Although the language is perhaps less precise than that of exception 1, there is nothing to suggest that the word "unduly" is intended as a reference back to the issue of relative seriousness introduced by subsection (2). Like exception 1, and like the test of "reasonableness" under section 117B, exception 2 appears self-contained.
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> 23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the

> discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.'

86. The criterion of undue harshness sets an elevated bar which carries a much stronger emphasis than mere undesirability.

87. The Court of Appeal confirmed in *HA (Iraq) and Another v. Secretary of State for the Home Department* [2020] EWCA Civ 1176, [2021] 1 W.L.R. 1327 that the question for tribunals under section 117C(5) is whether the harshness which the deportation would cause for the offender's child was of a sufficiently elevated degree to outweigh that public interest. The statutory intention is that the hurdle representing the unacceptable impact on a child should be set somewhere between the low level that applies in the case of a person liable to ordinary immigration removal where, by section 117B(6) of the 2002 Act, the test is whether it would not be reasonable to expect the child to leave the United Kingdom, and the very high level that applies to an offender who has been sentenced to a period of imprisonment of four years or more where, by section 117C(6), the test is whether there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

88. The Court further confirmed that although section 117C(5) required an offender to establish a degree of harshness that goes beyond an acceptable level, which might therefore be described as being an 'ordinary level of harshness', it is incorrect to find that the level of harshness in a particular case is 'ordinary' simply because it is not exceptional or because the facts fitted into some pattern that is commonly encountered in deportation cases.

89. I am therefore required to concentrate on the harshness to the qualifying children when accompanying their mother to Nigeria and whether the degree of harshness which would be caused to them would be 'undue'.

90. I observe that section 117C(5) of the 2002 Act is an exception to the public interest requiring the appellant's deportation.

91. The children are British citizens and presently aged ten and seven. They have never resided in Nigeria. Indeed, they have spent their lives in the United Kingdom.

92. I have found that the appellant's mother, and extended family network in Pelebosu, could provide initial support to the appellant and her children. However, as found by Judge Swaney, at [84], there will be limited employment opportunities for the appellant in the village. I also accept that the children will have to travel a little distance to attend school, though this does not by itself establish undue hardship.

93. I have found that there is support available to the appellant and her children through family members in Lagos. This is consistent with Judge Swaney's overall conclusion at [88]-[90].

94. I observe the preserved findings at [85]-[87] of Judge Swaney's decision:

- The appellant will return as a single mother.
- She will be caring for two children who will be adapting to life in Nigeria.
- It is reasonably foreseeable that the children will require considerable support as they adapt to a new education system, a different culture and what may well be a significantly different way of life.
- Such support is likely to limit the time the appellant is able to devote to looking for work or once she finds work, the hours she is able to work.
- The appellant will have to adapt to life in Nigeria, having left in 2008 when aged 18.
- She has limited experience of living independently as an adult in Nigeria.
- Her criminal conviction may well have an impact upon her ability to find employment in Nigeria.
- She has a lack of employment history and contacts in Nigeria.

95. The conclusion as to undue harshness in this appeal is a finely balanced one. I am mindful of the guidance provided to the application of the unduly harsh test by the Court of Appeal in *HA (Iraq)*. In this matter, I

conclude that the harshness which the deportation would cause for the offender's elder child is of a sufficiently elevated degree to outweigh that public interest. The tipping point is that it was not challenged that the elder child sat and passed an 11+ exam that opens access to several schools outside of their local area. The young child worked hard to pass the exam and can understandably be proud of both their efforts and the result. I accept that it is one of the most important events of their life to date. I am satisfied that to deny the child their reward for their efforts, for no fault of their own, in circumstances where they have already had to cope with the loss of their parents' presence after the criminal trial, and their rejection by their grandparents, and to require them to relocate to Nigeria would be unduly harsh.

96. In the circumstances, the appellant has established that she enjoys the benefit of Exception 2: she has a subsisting parental relationship with a qualifying child, and the effect of her deportation on her elder child would be unduly harsh.

Notice of Decision

97. By means of a decision sent to the parties on 24 August 2021 this Tribunal set aside the decision of the First-tier Tribunal promulgated on 26 March 2021 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

98. The decision is remade. The appeal is allowed on human rights (article 8) grounds.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Dated: 16 March 2022